No. 19

In the Supreme Court of the United States

OCTOBER TERM, 1964

THE AMERICAN OIL COMPANY, APPELLANT

v.

P. G. NEILL, ET AL

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF IDAHO

BRIEF FOR THE APPELLEE

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QUESTIONS PRESENTED

I. Can Idaho's authority to impose a tax on motor fuels, to be paid by the dealer, be inhibited by a contractual act between dealer and consumer whereby the place of the passing of title from dealer to consumer is ostensibly changed from Idaho to Utah?

II. Whether the immunity of the federal government to state taxes applies where the ultimate consumer of the commodity taxed is not the government but private individuals or corporations even though the government is technically the buyer.

III. Does the immunity of the federal government to state taxes apply in a case where the proceeds of the tax are restricted by the state constitution to use for the construction and maintenance of certain public facilities and the tax is based and imposed proportionately according to the extent of the use of the facility by the taxpayer?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional and additional statutory provisions which are relevant to the decision of this case, the pertinent text of which is set forth in Appendix hereto, are Article VII, Section 17 of the Idaho Constitution (1 Idaho Code 174) and parts of the Idaho Code, as amended, 9 Idaho Code 49-1210 and 49-1218.

STATEMENT

This is an action for the refund of certain taxes paid under protest to the Office of Tax Collector of the State of Idaho, by the Utah Oil Refining Company, predecessor to the American Oil Company, the appellant herein. The taxes, amounting to six cents per gallon were imposed on the dealer (Idaho Code, Section 49-1210 (a) (b)). Proceeds of any tax imposed on gasoline and other motor fuels, in excess of the necessary costs of collection and administration and refunds are required by the Idaho Constitution to be used exclusively for highway purposes (Idaho Constitution, Article VII, Section 17).

The fuel upon which the tax was paid was purchased under General Services Administration Contract No. GS-10S-14022 (R. 2, 68, 69) to be ordered by the Atomic En-

ergy Commission (referred to herein as A.E.C.) for use in connection with its facilities located in, and in the area surrounding, Idaho Falls, Idaho (R. 95). While this gasoline was included as Items 63(a)(b) and 64(a)(b) in the bid invitation (R. 95), the award of September 15, 1959, did not include them (R. 73). They were, however, apparently added to the contract as a result of telephone conversations confirmed by telegrams (R. 69-70).

Motor Fuel Tax Reports submitted to appellee for the months of November and December, 1959, and January, 1960, show the purchaser of the gasoline under General Services Administration Contract No. GS-10S-14022 to be Phillips Petroleum Company and A.E.C. (R. 27-31) with the exception of one item, Item 20, (R. 31) which shows the purchaser as General Electric Company and A.E.C. The address on these reports is variously listed as Idaho Falls and Scoville, Idaho. Subsequent reports list the purchaser as the Atomic Energy Commission, address, Salt Lake City. Actually the gasoline was consumed at all times in the State of Idaho by the Phillips Petroleum Company in connection with its management contract with the A.E.C. (R. 202).

In order to determine the full import of this management contract, it will be necessary to go back and examine, insofar as the record shows, the way in which this motor fuel was handled and consumed. The contract provided, among other things, for the operation of buses used for the transportation of employees of the National Reactor Testing Station between the site and their homes (R. 202, 208). In transporting these employees, the buses and other motor

vehicles travel over Idaho streets and highways between the site and at least 16 cities, towns and villages in Idaho within a radius of approximately 65 miles of the National Reactor Testing Station. Employees pay a fee or toll for their transportation (R. 208, 252) which fee accrues to the use and benefit of the government. Losses involved in the operation are absorbed by the government (R. 208, 252).

The nominal purchaser of the motor fuel upon which taxes are in dispute is the A.E.C. but the actual user and consumer is the Phillips Petroleum Company. An employee of the Company during the relevant period has admitted under oath that he personally ordered gasoline from the suppliers, and that he selected the common carriers which transported the gasoline to Idaho Falls where it was removed from vehicles under the supervision of the employees of his Company. He further admitted that transportation charges were paid to the common carrier by the Phillips Petroleum Company (R. 215-216). Furthermore, representatives of the company have admitted that the purchasing arrangement between the A.E.C., Phillips Petroleum Company and the suppliers of the gasoline, one of which is the appellant or its predecessor, was a paper transaction developed for the express purpose of avoiding the Idaho Motor Fuels Tax (R. 203).

Of the 607 items listed in the invitation for bids, only 2, Items 63(a) and 64(a) were bid excluding state tax. The bid was submitted showing the state tax of $ .06 included.

On September 15, 1959, appellant was awarded a contract on nine of the items included in the Invitation for Bids (R. 73). All of them called for delivery at Idaho lo-

cations except Item 486 which was to be delivered in Washington. None of them excluded state taxes.

ARGUMENT

SUMMARY OF ARGUMENT

The tax in question was imposed by statute (Idaho Code 49-1210) under a constitutional sanction requiring the proceeds of any tax on motor fuels to be used for highway purposes. Its constitutionality is questioned on two grounds: (1) that if its legal incidence is on the dealer it runs counter to both the Commerce Clause and the Due Process Clause of the Fourteenth Amendment and (2) that it violates the government's constitutional immunity from state taxation if the incidence is on the consumer. We do not believe either of these conclusions is necessarily true.

We agree that this is a privilege tax, the incidence of which falls on the dealer, but have argued that its validity is unimpaired whether considered in this light or as a use tax.

Only in a very artificial or mechanical sense can the transaction be said to take place outside of Idaho. The contract, taken as a whole, called for performance at a number of locations inside Idaho. Performance was pursuant to order as provided in the bid. Each of the two items in question were bid in the alternative; one bid called for delivery in Salt Lake City, the other at the local installation of the activity. For the first three months of the contract term the fuel was delivered at a destination inside the State of Idaho, (R. 27-31) after that at Salt Lake City. The fuel was consumed in buses operated by the Phillips Petroleum Company under the terms of a contract with the Atomic

Energy Commission. These buses were used for the purpose of conveying private individuals, employees of private contractors, to and from work.

Even though the contract was between the General Services Administration and the appellant, the former could hardly be considered as anything but a purchasing agent, acquiring motor fuel for a number of government agencies and activities including the A.E.C. Fuel purchased from appellant was to be delivered and presumably consumed, with the exception of Item 486, in the State of Idaho. No question was raised as to the tax on any items except 63 and 64.

Performance of the contract was largely predicated upon facilities and activities in Idaho. Under these circumstances the appellant cannot claim tax immunity on a portion of the contract. A corporation cannot channel its operations through a maze of local connections and still maintain its tax immunity. *General Motors Corporation v. Washington,* 377 U.S. 436. The fact that a tax is contingent upon events brought to pass without a state does not destroy the nexus between such a tax and transactions within a state for which the tax is an exaction. *Wisconsin v. J. C. Penny,* 311 U.S. 435. The test is whether the taxing power exacted by the state bears fiscal relation to protection, opportunities and benefits given by the state. *Wisconsin v. J. C. Penny,* supra. A formal contractual shift is without constitutional significance. *Scripto v. Carson,* 362 U.S. 207.

The revenue from the tax was channelled exclusively into a fund used for highway purposes. Article VII, Section 17, Idaho Constitution. Restrictions on the state's tax-

ing power under the Commerce Clause have been relaxed where it affirmatively appears that the tax was for this purpose. *Hendrick v. Maryland,* 235 U.S. 610. While a state may not tax the privilege of engaging in interstate commerce, it may impose a fair and reasonable tax on vehicles used in interstate commerce as compensation for using its highways. *Dixie Ohio Express Co. v. State Revenue Commission,* 306 U.S. 72.

The ultimate question is whether the tax, whatever its name may be, will in its practical operation, work discrimination against interstate commerce. *Halliburton Oil Well Co. v. Reilly,* 373 U.S. 64. There is no danger of any discrimination resulting from the imposition of this tax. On the contrary, it is patterned to eliminate that very feature. Anyone using Idaho's highways is required to contribute to the fund which pays for their construction and maintenance. Where the fuel upon which the tax is imposed is not so used a provision is made for refund. Where a tax on motor fuel is used exclusively for highway purposes, it is not discriminatory and is not an undue burden on interstate commerce. *Monamotor Oil Co. v. Johnson,* 292 U.S. 86.

Even if the tax is viewed as a levy upon the purchaser's use it is not a tax on the United States. It is ultimately used by private corporations and purchasers. The mere fact that an agent has effected the purchase will not be allowed to change the incidence of the tax. *Kern-Limerick v. Scurlock,* 347 U.S. 110. Nor will titular ownership by the government inhibit the imposition of tax upon private interests therein. *City of Detroit v. Murray Corp.,* 355 U.S. 489;

United States v. Township of Muskegon, 355 U.S. 484.

Neither is there any sanction against payment by the government of an excise tax on gasoline. These taxes were once invalid. *Panhandle Oil Co. v. State of Mississippi,* 277 U.S. 218; *Graves v. Texas Oil Co.,* 298 U.S. 393. The cases so holding, and presumably the legal principles involved, have been expressly overruled. *Alabama v. King & Boozer,* 314 U.S. 1.

Governmental immunity to state taxes does not extend where the tax is in the nature of an assessment for use of a public facility. *Tirrell v. Johnson,* 86 N.H. 530, 171 Atl. 641, aff'd 293 U.S. 533. There is a distinction between property which uses the public highways and that which does not. *Alward v. Johnson,* 282 U.S. 509.

I.

WHETHER OR NOT THE IMPOSITION OF A TAX VIOLATES THE DUE PROCESS CLAUSE OR THE COMMERCE CLAUSE OF THE FEDERAL CONSTITUTION SHOULD BE DETERMINED FROM THE PERFORMANCE OF THE CONTRACT VIEWED AS A WHOLE.

A. Taken as a whole the contract calls for performance in Idaho.

It seems to us a matter of some importance that neither of the parties involved in this transaction is simply an individual person. Both are sprawling and enormously complex entities—all pervasive organizations whose activities and interests are, from a geographical point of view, almost without limit. Because of the diverse and wide-spread nature of their operations almost any business activities between them could, by arrangement or otherwise, be across state

lines. Both have many legal domiciles (Appellant's Brief, p. 20). To designate any particular spot as the locus for the passing of title under these circumstances would be almost a thing of impulse.

While it is true that the invitations for bids were issued by the government in Seattle, Washington, the appellant submitted its bids from Salt Lake City, and the bids were accepted by the government in Seattle, this could hardly be said to be a factor in determining the locus of this particular transaction. These invitations covered 607 items in four states, only nine of which were originally awarded to the appellant. All except one of the items awarded to appellant called for delivery in Idaho. The two items in question, 63(a) and 64(a), were later awarded on the basis of telephone and telegraphic communications presumably as the result of some sort of negotiations. This part of the transaction did not specify the time of delivery nor the amounts to be included in each delivery. That was left up to the local governmental activity requiring the fuel. Nevertheless, and significantly, every single item in the bid schedule except the two in question called for delivery at the local installation of the particular governmental unit to which it was destined, and these two had alternate places of delivery, one of which was within the State of Idaho. Also, the bids submitted provided for the inclusion of a six-cent Idaho State Tax (R. 87). This was also true for the States of Oregon and Washington, the only other states in which appellant submitted a bid (R. 117, 137).

If we consider Items 4, 31, 43, 53, 76, 78, 81 and 82 as part and parcel of this transaction, and it is difficult to see

how such a result can be avoided, then it must certainly follow that most of the acts performed by the dealer in connection with the transaction took place inside the State of Idaho. Nor do the cases cited by the appellant bear out their contentions to the contrary. The case of *Connecticut General Company v. Johnson,* 303 U.S. 77, involved an insurance company authorized to do business in California. In Connecticut, where it was domiciled, it entered into contracts with other insurance companies, also licensed in California, to re-insure them against losses on policies of life insurance issued to California residents. The premiums were paid in Connecticut and the losses, if any, were also payable there. This Court declared invalid a tax imposed by California on the receipt of the re-insurance premiums paid to them. Here, quite clearly, the entire transaction took place outside of the taxing state. No portion of it really affected or was affected by events occurring there. Nothing was coming into or going out of California. "In the precise circumstances presented by the record it was found that the tax, neither in its measure nor in its incidence, was related to California transactions." *Wisconsin v. J. C. Penny,* 311 U.S. 435.

The analogy between *Union Refrigerator Transit Company v. Kentucky,* 199 U.S. 194, and the instant case is even more tenuous. There the State of Kentucky imposed a tax on tangible personal property permanently located in other states and used there in connection with the taxpayers business. Neither of these two cases is applicable to the situation presented in the case before us. Idaho is not attempting to impose a tax on the transaction remote to its

interests or on property located permanently outside its borders. All of the parties knew the property would be moved into the state and, in fact, the tax was not imposed until after it had been delivered to a point inside of the State of Idaho. "The fact that a tax is contingent upon events brought to pass without a state does not destroy the nexus between such a tax and transactions within a state for which a tax is an exaction." *Wisconsin v. J. C. Penny,* supra.

It is said that "A tax upon the sale itself—the transfer of title or possession—would undeniably be invalid under *McLeod v. Dilworth,* 322 U.S. 327." In that case the corporation upon which the state imposed the tax was not only a foreign corporation, it was not even authorized to do business in Arkansas, the situs of the proposed tax. All of the business it did in Arkansas was through the medium of salesmen domiciled in Tennessee who came into Arkansas and took orders which were sent back to the home office and accepted there The company was not set up to function in Arkansas and not even in the remotest sense had it subjected itself to the jurisdiction of the State of Arkansas or its taxing authorities. In the case we are now considering not only has the appellant gone into the State of Idaho to function as a business entity (R. 1) but has become licensed to engage in a particular kind of enterprise under a law which imposed certain conditions in the area of taxation (R. 2) by which it presumably agreed to abide.

Again, it is said that the State of Idaho seeks to avoid a constitutional barrier by resort to a bald fiction. In this transaction both buyer and seller were carrying on their respective endeavors inside the state imposing the tax. To

begin with, delivery was admittedly made to a point in the state. That was changed by agreement. The change required nothing more than a change of the point of destination on the bill of lading. To say, under these circumstances, that every act performed by the dealer in connection with the transaction took place outside of Idaho is, in itself, a patent fiction. On the other hand, there is no particular sanction, constitutional or otherwise, against imposing a tax on transactions which provide for the passing of title outside of the state. A number of cases have considered the problem and so held. See e.g., *General Trading Company v. Tax Commission,* 322 U.S. 335; *Henneford v. Silas Mason Company,* 300 U.S. 577; *General Motors Corporation v. Washington,* 377 U.S. 436; *Scripto v. Carson,* 362 U.S. 207; *Felt & Tarrant v. Gallagher,* 306 U.S. 62. This is particularly true when parties create artificial machinery or procedures to maintain the conditions required by law for tax exemption. *Scripto v. Carson,* supra, is a case in point. When the taxpayer argued that its "salesmen" were not its regular employees devoting full time to its service the Court said that "such a fine distinction is without constitutional significance," and added: "To permit such formal 'contractual shifts' to make a constitutional difference would open the gates to a stampede of tax avoidance." A more formal "contractual shift" than was effected by the parties in this case would be both difficult to find and unlikely to occur. It was made midway in the performance of the contract as shown by the tax reports (R. 27-44) and admittedly for the sole purpose of avoiding payment of the state tax (R. 203).

The appellant here has quite obviously installed and maintained extensive industrial and commercial facilities inside of the state. Much of this very transaction, we have seen, calls for complete performance inside its borders. It enjoys the protection of the state's laws and the benefit of the business of its residents. The test of a tax of this nature was enunciated in *Wisconsin v. J. C. Penny Company,* supra:

> "That test is whether property was taken without due process of law, or, if paraphrase we must, whether the taxing power exerted by the state bears fiscal relation to protection, opportunities and benefits given by the state. The simple but controlling question is whether the state has given anything for which it can ask return. The substantial privilege of carrying on business in Wisconsin, which has here been given, clearly supports the tax, and the state has not given the less merely because it has conditioned the demand of the exaction upon happenings outside its own borders."

B. *When a vendor holding a dealer's license enters into a contract, the major portion of which calls for performance inside the taxing state, two items arbitrarily selected for delivery by the dealer in another state cannot be said to be wholly dissociated from the vendor's local activities.*

Appellant is authorized to do business in the state of Idaho and has complied with all the laws pertaining to foreign corporations (R. 1). Furthermore, it is an Idaho licensed dealer in motor fuels under the Motor Fuels Tax law. It is obvious from the nature of the deliveries called

for in the contract that appellant maintains numerous facilities for the distribution of motor fuels in Idaho and that it has the necessary machinery in the state for the administration of business connected with these facilities. This becomes even more obvious when one considers that all except one of the items originally awarded to appellant under the contract call for delivery to Idaho destinations. We might say then that the commodity was to be consumed in Idaho and buyer and seller, although they might have been located elsewhere also, were likewise located inside of the state. Unquestionably, the contract as a whole, with the exception of the two controverted items, calls for performance in Idaho. To call the state's imposition of a tax a violation of due process under these facts seems to call for a strained construction of the term.

The transaction upon which the State of Idaho has imposed a tax in this case differs markedly from the situation in the several cases cited by appellant for the principle that this transaction was outside the state's taxing power. In the case of *McLeod v. Dilworth,* supra, all of the transactions on which Arkansas had imposed a tax were based entirely on acceptance of the offer in Tennessee. Every step in the performance of the contract took place in that state with the exception of the offer itself and that was communicated to the vendor there by its own agents. So far as appears in the statement of facts no situation arose where part of the contract was performed in Arkansas, part in Tennessee and there is no suggestion as to what the Court would have done under those circumstances.

In *Norton v. Department of Revenue,* 340 U.S. 534,

there is the same distinction. The Norton Company manufactured 225,000 items, of which only about 3000 were carried in the company's one Illinois branch. That part of the tax declared invalid by this Court was on items ordered directly by Illinois residents from the company's Massachusetts' plant. These transactions never involved the local office and were therefore clearly and wholly dissociated from any local activity of the company. In the *Norton* case, the company was quite obviously carrying on much, if not most, of its Illinois business on a mail order basis. The appellant here was equally obviously carrying on most of its local business through its local units. Motor fuel is not normally brought into a state by the consumer.

While it is true the taxes were upheld in *Henneford v. Silas Mason Company,* supra, *McGoldrick v. Berwind-White Company,* 309 U.S. 33, and *McGoldrick v. Felt & Tarrant Company,* 309 U.S. 70, on the ground that the direct burden of the levy was upon some incident, activity or use within the state, these holdings do not militate against the imposition of the tax in this case. Surely the changing of delivery, to a point outside the state, of some items called for in the performance of the contract should not enable parties to contend, as against the taxing power of the state, that this eliminates these items from the contract and dissociates that part of the contract from the vendor's local activities.

In the case of *General Motors Corporation v. Washington,* 377 U.S. 436, the protested tax was a gross receipts tax based on sales resulting from orders sent by General Motors dealers in Washington directly to the zone office at

Portland, Oregon, which orders were filled by direct shipments to the dealers from the factory. In affirming the validity of the tax the Court said: "Although mere entry into a state does not take from a corporation the right to continue to do interstate business with tax immunity, it does not follow that the corporation can channel its operations through such a maze of local connections as does General Motors, and take advantage of its gain on domesticity, and still maintain that same degree of immunity."

In a sense the instant case presents the reverse of the situation in *Wisconsin v. J. C. Penny Company,* supra. There the tax was imposed on an out of state transaction, namely the paying of dividends, but the basis had left rather than crossed into, the state imposing the tax. If a tax on income earned in and taken out of a state is a proper basis for the taxing power even after it was taken into another jurisdiction then surely gasoline moving into a state to be used on its public highways should be at least as adequate. The principle of taxing merchandise coming into a state was clearly illustrated in *Scripto v. Carson,* 362 U.S. 207. Even though Scripto, Inc., a Georgia corporation, did all of its Florida business through 10 wholesalers, jobbers or "salesmen" and maintained no offices or permanent staff of any kind there, the tax was declared valid. The Court did not specifically label it a use tax but merely commented "It is not a sales tax but 'was developed as a devise to complement [such a tax] in order to prevent evasion . . . by the completion of purchases in a non-taxing state and shipment by interstate commerce into a taxing forum'." Rejecting the contention that there was a lack of sufficient

nexus to impose tax liability under these circumstances the Court said, "The test is simply the nature and extent of the activities of the appellant in Florida."

II.

CONSISTENTLY WITH THE COMMERCE CLAUSE, A STATE MAY IMPOSE A FAIR AND REASONABLE TAX AS COMPENSATION FOR USING ITS HIGHWAYS.

While it is true that a state may not impose a tax on the privilege of engaging in interstate commerce, nevertheless, it may impose a fair and reasonable tax as compensation for using its highways for that purpose. *Dixie Ohio Company v. State Revenue Commission,* 306 U.S. 72, 76. The opinion in this case specifically referred to vehicles but the principle of making a distinction between taxes imposed for the benefit of highway construction and maintenance has been expressed many times. It was alluded to in *Spector Motor Service v. O'Connor,* 340 U.S. 602, 607, cited by appellant. See also *Hendrick v. Maryland,* 235 U.S. 610, *Aero Mayflower Transit v. Georgia Public Service Commission,* 295 U.S. 709; *Clark v. Poor,* 274 U.S. 554; *Kane v. New Jersey,* 242 U.S. 160. If it appears affirmatively by the nature of the imposition, such as a mileage tax directly proportionate to the use, or by express allocation of the proceeds to highway purposes, that the tax is levied only as compensation for use of the highways or to defray the expenses of regulating motor traffic it is valid. *Interstate Transit, Inc. v. Lindsey,* 283 U.S. 183.

There can be little doubt that the proceeds from these taxes are going to highway purposes since they are so re-

stricted by the State Constitution, Article VII, Section 17 and provision is made by statute for refunds of all taxes on motor fuel not used on the state's highways, Idaho Code, Section 49-1218.

The tax must be fair and reasonable. A tax may not discriminate against interstate commerce in favor of local trade, nor impose cumulative burdens upon interstate trade or commerce. *International Harvester Company v. Department of Treasury,* 322 U.S. 340, 358. This tax does not contravene these principles. It treats everyone alike. There is no discrimination against either interstate or intrastate business. On the contrary this very section of Idaho's motor fuels tax law was developed to eliminate discrimination. The tax is always on the dealer licensed by the state to traffic in this commodity and is designed to prevent rather than to require or even permit a higher exaction from one type of operation than the other. *Western Union Telegraph Company v. Kansas,* 216 U.S. 1, cited by appellant, hardly presents the same situation. The tax there was on all of its authorized capital representing business and property both within and outside of the state and was imposed as a condition of its right to do business in Kansas. There is no such general tax problem involved in this case. It is designed to equalize among all who use Idaho's highways the burden of building and maintaining them. A tax on motor fuel, where it is to be used exclusively for highway purposes, is not discriminatory and is not an undue burden on interstate commerce. *Monomotor Oil Company v. Johnson,* 292 U.S. 86.

III.

EVEN IF THE IDAHO TAX IS VIEWED AS A LEVY UPON THE PURCHASER'S USE OF MOTOR FUELS WITHIN THE STATE IT IS NOT INVALID AS A DIRECT TAX UPON THE UNITED STATES.

A. *The United States was not the ultimate consumer of the motor fuel in question, acting merely as a purchasing agent for the private corporations and individuals who used it.*

Even if the tax in question was to be viewed as a sale or use tax there is no violation of federal tax immunity by the State of Idaho in imposing the tax on the gasoline sold to the A.E.C. Appellant's position to the contrary, we believe, does not necessarily follow. The United States, although the nominal purchaser, was not the ultimate user or consumer of the object of the tax. This is illustrated perfectly in *Kern-Limerick, Inc. v. Scurlock,* 347 U.S. 110, where the reverse of the situation is presented. There the State of Arkansas was attempting to collect, under its gross receipts tax law, a tax on two diesel tractors sold to a joint venture for government use. The contract provided that the contractor should be the purchasing agent and the government was to be directly liable to the vendors for the price. The tax was held to be invalid as a direct tax on the United States, the ultimate consumer. The obvious corollary to that situation is where the government buys a product for use by private consumers—exactly what we have here—and if the government is immune to a tax where private parties make a purchase for its benefit, the private parties should be liable where the government makes a purchase for their benefit.

But even if this were not the case and the United States was concededly the only and the ultimate user and consumer of the motor fuel in question it is still a valid tax. This Court had almost the identical question before it as long ago as 1928, *Panhandle Oil Company v. State of Mississippi*, 277 U.S. 218. In that case a contention that a dealer was not liable for a tax on that portion of gasoline sold to the United States for consumption by the Coast Guard and Veterans' Administration was upheld. Subsequently, in 1936, this Court decided *Graves v. Texas Company*, 298 U.S. 393. The statute constitutionally questioned in that case provided for an excise tax to be paid by the dealer "upon the selling, distributing, storing or withdrawing from storage in this state for any use, gasoline." It was clearly a sales tax and under the holding in *Panhandle* the dealer was held not to be liable for the tax on sales of gasoline to the United States. Both cases were specifically overruled in *Alabama v. King & Boozer*, 314 U.S. 1, 9. If the *Panhandle* and *Graves* cases were wrong under more modern concepts of governmental tax immunity there can be no doubt of the validity of the Idaho tax.

B. *Even if the tax be viewed as a toll or assessment, it falls into a different category from a sales or use tax and does not belong to that class from which the United States is immune.*

One thing is certain. This Court has always found taxes imposed for the purpose of constructing and maintaining public highways were perfectly valid as long as they bore a reasonable relation to the privilege of using the highways and this was always true even though interstate commerce

was involved. *Hendrick v. Maryland,* supra, (1915); *Kane v. New Jersey,* supra, (1916); *Clark v. Poor,* supra, (1927); *Sprout v. City of South Bend,* 277 U.S. 163, (1928); *Interstate Transit, Incorporated v. Lindsey,* 283 U.S. 183, (1931); *Aero Mayflower Transit Company v. Georgia Tax Commission,* supra, (1935); *Dixie Ohio Express Company v. Commission,* supra, (1938). The reason is obvious particularly where the tax is on gasoline and other motor fuels. It represents one of the few areas where the tax imposed presents a perfect relationship to the benefits enjoyed. A tax on a package of cigarettes or a suit of clothes, for example, would bring no tangible benefits. One could presumably derive the same enjoyment without the tax, and taxed or not, the object could be enjoyed to the same extent within or without jurisdiction imposing the tax. Where highways are built and maintained with taxes on gasoline and other motor fuels as they are in Idaho and many other states, the taxes on each gallon of fuel are clearly related to the enjoyment of highways as well as the fuel, and the amount of enjoyment is frequently proportionate to the amount of tax. Furthermore, the tax is levied only where the enjoyment is in the jurisdiction in which it is imposed.

Appellant insists that our reliance on the case of *Tirrell v. Johnson,* 86 N.H. 530, 171 Atl 641, aff'd 293 U.S. 533, is misplaced. It is said that the case was decided on two grounds, one, that governmental immunity did not attach in the case of a tax of this kind because it was in the nature of a toll and two, that the purchaser was not the federal government but a private contractor. The case was

affirmed in a memorandum decision, and, appellant says, affirmed solely on the second ground. If indeed it is possible to render any sort of interpretation from a memorandum decision, we seriously question whether or not that is the correct one. The very first case cited in the per curium opinion, *Alward v. Johnson,* 282 U.S. 509, 514, 51 S.Ct. 273, 75 L. ed 496, 75 A.L.R. 9, was almost identical factually with *Tirrell v. Johnson,* supra, except that the tax was based upon gross income rather than on gasoline. The taxpayer operated automotive stage lines by virtue of a contract with the Post Office Department. The theory that this was a toll rather than a tax was not advanced but neither was the theory of governmental immunity. Nevertheless, the Court did say that "The distinction between property employed in conducting a business which required constant and unusual use of the highways and property not so employed is plain enough."

The distinction has been frequently used. In *Interstate Transit, Inc. v. Lindsey,* supra, this Court had under consideration a tax imposed on motor buses, graduated according to the carrying capacity. For example, it imposed a tax of $500 per year for each vehicle seating more than 20 and less than 30 passengers. In an opinion reversing the decision of the Supreme Court of Tennessee holding the tax invalid, Mr. Justice Brandeis stated: "While a state may not lay a tax on the privilege of engaging in interstate commerce (citations) it may impose even upon motor vehicles engaged exclusively in interstate commerce a charge, as compensation for the use of the public highways, which is a fair contribution to the cost of constructing and maintain-

ing them and of regulating the traffic thereon." Cited in the *Lindsey* case was *Clark v. Poor,* supra, wherein a similar tax was upheld on the same reasoning. The same Justice there stated: "The highways are public property. Users of them although engaged exclusively in interstate commerce are subject to regulation by the state to be sure of safety and convenience and the conservation of the highway. (citations) Users of them although engaged exclusively in interstate commerce may be required to contribute to their costs and upkeep. Common carriers for hire who make the highways their place of business may properly be charged an extra tax for such use."

While it is true that these cases involve interstate commerce and not tax immunity by the United States, neverheless it is quite apparent that this Court has always noted a difference in this type of tax which is exacted specifically for the purpose of constructing and maintaining highways and moreover it is imposed on a basis that has an extremely close relevance to the amount of use enjoyed by the taxpayer. One way or another, the amount of the fuel consumed, and therefore the amount of tax paid, is related in almost perfect proportions to the amount of use derived from the highway. It follows, of course, that the cost of constructing and maintaining highways, to the state, is similarly related to the amount of use these highways receive from the motorists who use them.

The whole doctrine of federal immunity to state taxes began with Chief Justice John Marshall's famous pronouncement "The power to tax is the power to destroy" in the case of *M'Cullock v. Maryland,* 4 Wheat. 316. At that

time and in that case the doctrine had some validity. The tax was a direct property tax upon an instrumentality of the government located inside the state. Federal operations could certainly be discouraged if not actually inhibited by the sort of tax which could be manipulated at the will of local politicians. These same considerations are not relevant where the ultimate question is whether or not the United States government should pay the same price as any private individual for motor fuels which it intends to consume in vehicles utilizing the highways constructed and maintained by the State of Idaho. This is particularly true when these vehicles are used to transport the employees of private contractors to and from work. That these same highways should have been partly constructed by funds provided by another branch of the federal government is not the question. Idaho has imposed this tax and used this method of imposing it in order that there be no discrimination among the motorists using its public highways. It only asks, in the same spirit, that there be no discrimination against it by these same motorists including the federal government.

CONCLUSION

For the reasons stated the judgment of the court below sustaining the tax should be affirmed.

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APPENDIX

The pertinent portion of the Idaho Constitution (I Idaho Code 174) is as follows:

Article VII,

* * *

§ 17. *Gasoline taxes and motor vehicle registration fees to be expended on highways.*—On and after July 1, 1941 the proceeds from the imposition of any tax on gasoline and like motor vehicle fuels sold or used to propel motor vehicles upon the highways of this state and from any tax or fee for the registration of motor vehicles, in excess of the necessary costs of collection and administration and any refund or credits authorized by law, shall be used exclusively for the construction, repair, maintenance and traffic supervision of the public highways of this state and the payment of the interest and principal of obligations incurred for said purposes; and no part of such revenues shall, by transfer of funds or otherwise, be diverted to any other purposes whatsoever.

The pertinent portions of the Idaho Code, as amended, 9 Idaho Code 49-1210 and 49-1218 are as follows:

49-1210. Report of Motor Fuel Received—Excise tax.—(a) In addition to the taxes now provided by law, each and every dealer, as defined in this chapter, shall, not later than the twenty-fifth day of each calendar month render a statement to the commissioner of all motor fuels received, as the term "received" is defined in section 49-1201, during the preceding calendar month, and pay an ex-

cise tax of six cents per gallon on all motor fuels as provided * *in subsection (b) of this section*. Such statements shall include the following: (1) An itemized statement of the number of invoiced gallons of motor fuels received, within the meaning of the term "received" as defined in section 49-1201, by such dealer within this state during the next preceding calendar month. Such statement shall show the date, place, and quantity of each receipt of motor fuels, the point of origin, the method by which received, the name of the person from whom motor fuels were received, and such other details of each transaction or operation by which motor fuels were received as the commissioner may consider necessary for the proper administration of this chapter. (2) An itemized statement showing the number of gallons of motor fuels received and thereafter disposed of by **deductible* transactions authorized in this chapter, together with such supporting details of each such transaction as the commissioner may consider necessary for the proper administration of this chapter.

(b) At the time of filing each monthly report each dealer shall pay to the commissioner an excise tax of six cents per gallon on all motor fuels "received," within the meaning of the term "received" as defined in section 49-1201, by such dealer during the next preceding calendar month, * * *less* the * *deductions* and credits authorized in this chapter. Such tax shall be computed as follows: (1) From the total number of gallons of motor fuels received by the dealer within the state during the next preceding calendar month upon which the tax has not been paid or accrued, shall be made the following deductions: (A) the number of gal-

lons of motor fuel disposed of by * *deductible* transactions authorized in section 49-1215 and (B) the number of gallons of motor fuels subject to tax under section 49-1227 and (C) the number of gallons * * * *upon which tax has been paid for which credit may be taken under subsection (e) of this section and (D) the number of gallons* which shall be equal to two per cent of the total number of gallons received during the preceding calendar month less the total number of gallons deducted under subparagraphs (A) and * (C) of this paragraph, which credit is granted dealers and retail dealers to cover evaporation, shrinkage, and losses, and to reimburse the dealer for his expenses incurred on behalf of the state in maintaining records, collecting tax moneys, preparing necessary reports and remittance in compliance with this chapter. Provided, however, that one-half of said two per cent deduction * * *shall be passed on* to the retail dealers, and shall be deducted from the invoice on all sales of motor fuels made by dealers to retail dealers by the dealer deducting from the invoice price one per cent of the total motor fuels tax on each gallon sold to the retail dealer at the time of purchase. (2) The number of gallons remaining after the deductions and credits hereinabove set forth have been made shall be multiplied by six cents and the resulting sum shall be the amount of motor fuel tax to be paid for the next preceding month. The report and remittance shall be considered to have been filed within the required time if the envelope in which they are contained is postmarked on or before midnight of the twenty-fifth day of the calendar month in which due and payable.

(c) Whenever it shall appear from the monthly report

filed by any dealer that such dealer has, during the period covered by such report, exported, sold *or* used * * * during such period an amount of motor fuel as set forth in subparagraphs (A) * , (B) *and* (*C*) of subsection (b) (1) of this section in excess of the amount of motor fuels received by such dealer within the state of Idaho during said period, such dealer shall be entitled thereupon to a refund of the excess tax payment.

(d) All monies received from one cent of the six cents per gallon tax herein provided for shall be placed in the state highway fund to be used only for the purpose of matching federal funds for the construction, maintenance, improvement and reconstruction, of highways and farm to market roads in the state of Idaho, as provided for in federal acts.

(*e*) *In lieu of the collection and refund of the tax on motor fuels used by a dealer in such a manner as would entitle a purchaser to claim refund under section* 49-1218, *or in lieu of the refunding of any prior erroneous payment of tax made to the state by a dealer, credit may be given the dealer upon his tax return and the determination of the amount of his tax.*

(*f*) *Credit may be given any dealer, upon his tax return and the determination of the amount of his tax, for tax remitted by him to the state on gasoline which is subsequently returned to such dealer's pipe line, terminal or refinery and placed in tanks thereat.*

49-1218. Refunding of Tax.—Any person who shall buy fifty gallons or more and use any motor fuel for the

purpose of operating or propelling stationary gasoline engines, tractors or motor boats engaged in commercial uses other than fishing, or for cleaning or dyeing or other use of the same, except as otherwise provided by law, and except in any motor vehicle required to be registered by the provisions of the uniform motor vehicle registration act, or exempt from registration by reason of ownership or residence and except an aircraft, and who shall have paid any excise tax on such motor fuel hereby required to be paid, whether directly to the vendor from whom it was purchased, or indirectly by adding the amount of such excise tax to the price of such motor fuel, shall be entitled to be reimbursed and repaid the amount of such excise tax so paid by him in the following manner and under the following conditions:

(a). Claimant shall present to the commissioner a statement supported by the original receipted seller's invoices showing purchase. Such statement shall be certified by the claimant to be true and correct and shall state the name of the person from whom purchased, the date of purchase, the total amount of such motor fuel purchased, that the motor fuel so purchased has been paid for, and that the same has been used by said claimant otherwise than in motor vehicles operated or intended to be operated upon the public highways within the state of Idaho.

Upon approval by the commissioner and the state board of examiners of such statement and supporting invoices, the state auditor shall draw his warrant upon the state treasurer for the amount of such claim in favor of such claimant and such claim shall be paid from the "motor fuel re-

fund fund": Provided, that the application for reimbursements and repayments as provided herein shall be filed with the commissioner within three hundred and sixty (360) days from the date of purchase, or not at all.

(b). The commissioner shall have the right, in order to establish the validity of any claim, to examine the books and records of the claimant for such purpose, and the failure of the claimant to accede to the demand for such examination shall constitute a waiver of all rights to the refund claimed on account of the transaction questioned.

(c). When the motor fuel is sold to a person who shall claim to be entitled to a refund of the tax hereunder imposed, the seller of such motor fuel shall make out a separate invoice for each purchase showing the name and address of the seller and the name and address of the purchaser, the number of gallons of motor fuel so sold, and the date. Such invoice shall be of serial number type especially used for the sale of petroleum products and shall be issued in at least duplicate copies, the original of which shall be given to the purchaser at the time of sale, and the duplicate copy shall be retained by the seller for a period of one year from date of sale, subject to the inspection of the commissioner; all invoices shall be written in ink or with indelible lead pencil and shall be void if any corrections or erasures appear upon the face thereof.

The above conditions having been fully complied with, the commissioner shall determine the amount of refund due to such applicant, and the same shall be paid as herein provided; provided, that the commissioner shall have power

to put into effect such regulations as in his judgment may be necessary to detect the uses and purposes to which gasoline or other motor fuel upon which refund of taxes applied for is put.

The commissioner may in his discretion require each applicant for a refund under this act to make out his claim upon blanks to be prepared and furnished by the commissioner, which blanks shall have plainly printed thereon the provisions relating to the penalties for making false claim for refund.